

## BOARD OF ZONING APPEALS MINUTES

Gardner, Kansas

August 21, 2002

The Board of Zoning Appeals met in regular session on the above date at the Gardner Senior Citizens Building, 128 East Park Street, Gardner, Kansas.

Board Members present: Kipp Willnauer, Mike Hutton, Scott Maguire, Vernon Pickert, Art Stirnaman. Board Members absent: None. Also present: Community Development Director Fred Sherman, Planner Brian Harker, applicant Stephen Shumate, and three interested citizens.

### I. Call to Order

Chairman Willnauer called the meeting to order at 6:30 p.m. with a quorum present.

### II. Approval of Minutes

Motion Pickert, second Hutton, to approve the minutes of the July 17, 2002, Board of Zoning Appeals meeting. 5-0 Aye

### III. Swearing In

Newly appointed board member Art Stirnaman was sworn in by Community Development Director Sherman.

### IV. Agenda Items

1. **Consider a request for variance from Section 16-503.6.C. Rear Yard Setback regulations in an R-1 (Single Family Residential District) to reduce the required setback from the rear property line from twenty-five feet (25') to eighteen feet and eight inches (18'8").**

Chairman Willnauer opened the public hearing at 6:33 p.m.

Director Sherman gave the staff report, and distributed a letter (Exhibit A) from an adjacent property owner, Tollefson Development, Inc., to the board.

1. **APPLICANT:** Stephen Shumate on behalf of DD & Associates, Inc., the property owners of record.
2. **REQUESTED ACTION:** Consider a variance request from Section 16.503.6.C. Rear Yard Setback in an R-1 (Single-Family Residential District) to reduce the required setback.  
*"Requesting a rear lot line variance. We inadvertently built the house incorrectly and are asking the rear setback requirement be waived."*
3. **LOCATION:** The property is located at 29912 W. 183<sup>rd</sup> Terrace.
4. **PROPERTY DESCRIPTION:** This property is currently zoned R-1, Single-Family Residential.
5. **ZONING ORDINANCE PROVISIONS:** The following zoning ordinance provisions are applicable to this variance request:  
**16-503 DISTRICT "R-1" SINGLE FAMILY RESIDENTIAL DISTRICT.**  
503.6 YARD REGULATIONS.
  - A. **FRONT YARDS:** The front yard shall be a minimum of 25 feet in depth measured from the front lot line if the street right-of-way is 60'. When the street right-of-way is 50', or for lots fronting a cul-de-sac, the minimum front yard shall be 30'.
  - B. **SIDE YARDS:** No side yard shall be less than nine feet (9'), except as provided for zero-lot line development. The total side yard shall equal or exceed 20% of the lot width at the front building line. Buildings on corner lots shall provide a side yard on the street side of not less than twenty (20) feet.

- C. REAR YARDS: No rear yard shall be less than twenty (20) percent of the depth of the lot, or with a minimum of twenty-five (25) feet. Any pre-existing, nonconforming fence that is replaced 50% or more must come into compliance with the fence ordinance.

**16-404 DEFINITIONS**

BUILDING, PRINCIPAL. A building, including covered porches and paved patios, in which is conducted the principal use of the lot on which it is situated. In any residence district any dwelling shall be deemed to be the principal building on the lot on which the same is situated.

FRONT. The part or side of any building or structure facing the street or frontage road which is used as the basis for establishing the permanent address for that building or structure, as listed in the City Directory.

LOT. A parcel of land occupied or to be occupied by one main building, or unit group of buildings, and the accessory buildings or uses customarily incident thereto, including such open spaces as are required under these regulations, and having its principal frontage upon a public street. A lot as used herein may consist of one or more platted lots, tracts, or tracts as conveyed, or parts thereof.

LOT, FRONT. The front of a lot shall be that narrowest dimension abutting a street right-of-way. On corner lots which have two equal sides which abut on a street right-of-way, either side may be considered the front of the lot

YARD. An open space at grade between a building and the adjoining lot lines, unoccupied and unobstructed by any portion of a structure from the ground upward, except as otherwise provided. In measuring a yard for the purpose of determining the width of a side yard, the depth of a front yard or the depth of a rear yard, the least horizontal distance between the lot line and the building shall be used.

YARD, FRONT. A yard across the full width of the lot extending from the front line of the main building to the front line of the lot.

YARD, REAR. A yard between the rear lot line and the rear line of the main building and the side lot lines.

6. **ZONING ORDINANCE VARIANCE REQUEST:** A variance from Section 16-503.6.C would need to be granted to allow occupancy of the residence:

REAR YARDS: No rear yard shall be less than twenty (20) percent of the depth of the lot, or with a minimum of twenty-five (25) feet. Any pre-existing, nonconforming fence that is replaced 50% or more must come into compliance with the fence ordinance.

The residence at 29912 W. 183<sup>rd</sup> Terrace was constructed in late 1999 and early 2000 (Building Permit #99-354) and has remained unoccupied. An occupancy permit cannot be issued by the City without the variance request being granted; or the property owner acquiring additional property to bring the lot and structure into compliance with the Zoning Regulations; or the property owner altering the structure to meet the setback requirements.

The applicant applied to the City of Gardner for a variance from the rear yard setback in 2000 (BZA-00-02). On November 30, 2000, the Board of Zoning Appeals voted 3 to 2 to deny the variance request. Copies of the meeting minutes and other correspondence are enclosed.

7. **VARIANCE CRITERIA:** Pursuant to the requirements of K.S.A. 12-715 and Section 16-1601.3 of the City Code, The Board of Zoning Appeals may grant a variance from the Zoning Ordinance provided that the Board finds that all of the following five conditions have been met. The applicant has provided as part of the application materials their response to the five conditions, which is included as an attachment to this staff report.

**Does the variance request arise from such condition which is unique to the property in question and which is not ordinarily found in the same zone or district; and is not created by an action or actions of the property owner or applicant?** Yes. The property is in a developed single-family residential subdivision. The applicant hired a reputable engineering company to complete a building survey for construction of a single-family residence. A plot plan was submitted to the City and approved with the issuance of a building permit. At the time the only setback information required to be shown on the plot plan was the front yard setback. The side and rear yard setbacks appeared to be close to the required setback minimums. Construction on the residence commenced, the foundation was poured, and the walls and roof were constructed when the adjacent property owner approached the City regarding the required rear yard setback. A survey was ordered which determined that only an eighteen foot setback had been provided. City staff procedures regarding the required information to be submitted with a building permit have been modified, and all setbacks are shown on plot plans.

The applicant met with the adjacent property owner, who also farmed the land, and offered to purchase a strip of land to bring the property into compliance. The City conducted a meeting with all involved parties in February of 2000. The builder and the adjacent property owner, at that time, were not able to agree on terms for the sale of property.

The adjacent property to the west was then sold in 2002 to a development firm based in Minnesota – Tollefson Development, Inc. In 2002, that property was annexed; rezoned to R-1, Single-Family Residential District; and the preliminary and final plats were approved by the City of Gardner. The final plat of Fairfield subdivision was approved with the option to divide the lots so that a small parcel of land could be conveyed to this subject property to bring it into compliance, if the two parties could agree to terms and price of a purchase. The applicant and representatives of Tollefson Development were not able to agree to terms of purchase of a small tract of land west of the subject property, and the final plat of Fairfield subdivision was filed without a small individual parcel of land adjacent to this subject property.

The owner of this subject property has been unable to agree to terms of purchase of an individual tract of land on the adjacent property with two consecutive property owners.

**Will the granting of the permit for the variance adversely affect the rights of adjacent property owners or residents?** No. The City has obtained easements across the adjacent property for future sanitary sewer improvements.

Adjacent development in the future will be required to have appropriate setbacks based on the zoning district regulations. The lot is located in a cul-de-sac and the houses are all situated on angles parallel to the street. Only a portion of the rear of the house intrudes into the required setback.

**Will the strict application of the provisions of the Zoning Ordinance of which the variance is requested constitute unnecessary hardship upon the property owner represented in the application?** Yes. The applicant would not be able to meet the required rear yard setback; therefore, a certificate of occupancy cannot be issued. Strict application would require the structure to be removed or altered, remain unoccupied, or wait until the adjacent properties change ownership again in order for the applicant to negotiate the purchase of a small tract of land. This would be a tremendous hardship to the applicant.

**Will the variance desired adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare?** No. The variance will not be noticeable. This lot is situated on a cul-de-sac and the houses will all be set at angles to each other. Ample side yard setbacks are provided. In most areas, the side yard will exceed the required setback. The yard area provided on this lot exceeds standard lot sizes due to the triangular shape of the lot.

**Will the granting of the variance desired be opposed to the general spirit and intent of the Zoning Ordinance?** No. The rear yard setback is required to provide minimum separation for life safety purposes, as well as privacy of yard area for individual property owners. Setbacks can be varied. Rear yard setbacks in Gardner are typically required to be twenty-five feet unless the Planning Commission and City Council approve a lesser setback in association with a planned development. Staff does not see any life safety issues related to this application.

8. **STAFF RECOMMENDATION:** Staff recommends that the Board of Zoning Appeals grant a variance to Section 16.503.6.C. Rear Yard Setback in the R-1 District of the Zoning Ordinance to reduce the required setback from 25 feet (25') to eighteen feet and eight inches (18'8") on property located at 29912 W. 183<sup>rd</sup> Terrace.

Chairman Willnauer invited comments and questions from the board.

Applicant Stephen Shumate of DD & Associates, Inc., gave a presentation. He explained the history of the property and the variance request; and distributed a plot plan of the subject property and two adjoining properties to the west. He also explained the history and timetable of purchase negotiations with two different owners of the property west of the subject property.

Board Member Pickert asked how much more property would be needed to bring the subject property into compliance. Mr. Shumate stated that 785 square feet from two lots in the adjoining subdivision would have brought his property into compliance.

Board Member Pickert and Director Sherman briefly discussed the sewer line easement on the Fairfield subdivision property west of the subject property.

Board Member Hutton asked the applicant why he had not appealed the previous variance request denial to the district court. Mr. Shumate said that his attorney had advised against such an action because of the time and expense involved. He again explained that his engineer was attempting at that time to negotiate a purchase of the necessary property from the new property owner.

Board Member Maguire asked if it would be difficult to sell the house with a variance and restrictions on placement of a back deck. Vickie Winters, realtor for the applicant, said that she didn't think that would be a problem because she had sold many homes with similar lot designs.

Board Member Hutton stated that it would be difficult to prevent a future homeowner of the subject property from encroaching further into the rear setback with a deck or patio.

Board Member Pickert and Mr. Shumate discussed a proposal to build a three-foot wide rear door landing and steps leading to a patio that would not encroach upon the setback requirements.

Board Member Stirnaman and Mr. Shumate again discussed the history of the property variance request. Mr. Shumate explained the timeline, including the untimely death of Dennis Duncan, the applicant's business partner, from the original variance request to date. Mr. Shumate stated that, since the western adjoining property was now platted and the individual lots were plotted, the board could know exactly how far the rear building lines of those new homes would be from the subject house, and that his property's rear setback encroachment had been taken into account by the engineer when plotting the lots of the adjoining property.

Board Member Hutton stated that, while the board understood the applicant's difficulties during the time between the variance requests, those difficulties were not pertinent to the board's decision. Mr. Shumate agreed that it was certainly the board's prerogative to determine what information was pertinent to their deliberations.

Chairman Willnauer and Director Sherman discussed the setback requirements and building patterns of Fairfield, the new subdivision to the west. The board also noted that Fairfield currently conformed to the zoning regulations as platted; and the lots would have conformed even if portions of the properties were sold to the applicant to be included as part of the subject property to bring it into code compliance. Director Sherman clarified that the front setback line of a lot typically established where a building would be sited on the lot; and that whether the variance was granted or land was conveyed to the subject property, the effect on the setback requirements of the Fairfield lots would not be noticeable and would not impact the locations of where the houses would be built on the lots.

Chairman Willnauer invited comments and questions from the public.

Butch Freund of 507 S. Hickory Street, former owner of the adjoining western property, stated that granting the variance request would set a bad precedent. Chairman Willnauer clarified that the board had to deal with each variance request on its individual merits. Board Member Hutton expressed his concerns about setting a precedent, as the letter from the new western property owner stated (Exhibit A).

Director Sherman added that the letter had verified the applicant's description of the purchase negotiations.

Board Member Pickert expressed his concerns with staff errors that compounded the original construction errors.

Darrell Prock of 29908 W. 183<sup>rd</sup> Terrace, Director Sherman, and Board Member Hutton briefly discussed the fifteen foot easement along the west side of the subject property.

Chairman Willnauer closed the public hearing at 7:20 p.m.

Chairman Willnauer invited comments from the board.

Board Member Stirnaman stated that the platting and plotting of the former farmland west of the subject property was pertinent information to consider.

Director Sherman clarified that the applicant had attempted to purchase the necessary ground he needed before it was platted, but the former property owner had not been interested in selling. He agreed that the property owner had, through his own construction error, created the situation, but all his efforts to remedy the situation had met with considerable difficulty.

The board members reviewed the variance criteria and agreed that:

- the house was built by the applicant's company in the wrong location on the lot; but the property was unique given the situation regarding the ownership changes on the adjacent property;
  - the requested variance would not adversely affect the adjacent property owners based on the development patterns and setbacks established with the final plat of the Fairfield subdivision;
  - denial of the variance request would constitute unnecessary hardship on the applicant; and
  - granting of the variance request would not adversely effect the public welfare;
- but disagreed whether granting of the variance request would not be opposed to the general intent of the Zoning Ordinance.

Motion Pickert, second Maguire, to approve the variance request from Section 16-503.6.C. Rear Yard Setback regulations in an R-1 (Single Family Residential District) to reduce the required setback from the rear property line from twenty-five feet (25') to eighteen feet and eight inches (18'8"), subject to the following condition:

- a. The current property owner shall construct a rear door access landing no wider than three feet (3') toward the west property line, with steps accessing a ground level patio or deck.

4-1 (Willnauer, Pickert, Maguire, Stirnaman – Aye; Hutton – Nay)

Chairman Willnauer and Director Sherman discussed the City's processes and procedures which would enforce the variance condition set by the board.

Board Member Hutton stated that the applicant's problem should have never happened, and should not have continued so long.

## **V. Adjourn**

Motion Stirnaman, second Maguire, to adjourn the meeting at 7:33 p.m.

5-0 Aye